

1 GEORGE J. BARRON, BAR NO. 53117  
george@donahue.com  
2 ANDREW S. MACKAY, BAR NO. 197074  
andrew@donahue.com  
3 DONAHUE GALLAGHER WOODS LLP  
Attorneys at Law  
4 1999 Harrison Street, 25th Floor  
Oakland, California 94612-3520  
5 P.O. Box 12979  
Oakland, California 94604-2979  
6 Telephone: (510) 451-0544  
Facsimile: (510) 832-1486  
7

8 Attorneys for Plaintiff  
DAVID LOFTON

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11

12 DAVID LOFTON,

13 Plaintiff,

14 v.  
15

16 ZURICH AMERICAN INSURANCE  
COMPANY, a New York corporation,

17 Defendant.  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Case No. C12-03835 MMC

STIPULATION TO FILE SECOND  
AMENDED COMPLAINT FOR DAMAGES  
AND ~~PROPOSED~~ ORDER

On September 28, 2012, the Court issued an Order to Show Cause ("OSC") concerning the jurisdiction of this Court. Plaintiff David Lofton ("Plaintiff") seeks to file a Second Amended Complaint ("SAC"), attached hereto as Exhibit A, in response to the OSC.

Defendant Zurich American Insurance Company ("Defendant"), by and through its counsel, hereby stipulates and agrees that Plaintiff may file the SAC. Nothing in this stipulation, however, waives or limits Defendant's right to respond to or challenge the contents of the SAC now or in the future.

IT IS SO STIPULATED,

Dated: October 16, 2012

DONAHUE GALLAGHER WOODS LLP

By: /s/ George J. Barron  
George J. Barron  
Attorneys for Plaintiff  
DAVID LOFTON

Dated: October 16, 2012

OGLETREE, DEAKINS, NASH, SMOAK &  
STEWART, P.C.

By: /s/ Danielle Ochs  
Danielle Ochs  
Attorneys for Defendant  
ZURICH AMERICAN INSURANCE  
COMPANY

**ATTESTATION**

Pursuant to Local Rule 5-1, I attest that concurrence in the filing of this document has been obtained from each of the other signatories.

Dated: October 16, 2012

DONAHUE GALLAGHER WOODS LLP

By: /s/ George J. Barron

George J. Barron  
Attorneys for Plaintiff  
DAVID LOFTON

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# EXHIBIT A

1 GEORGE J. BARRON, BAR NO. 53117  
george@donahue.com  
2 ANDREW S. MACKAY, BAR NO. 197074  
andrew@donahue.com  
3 DONAHUE GALLAGHER WOODS LLP  
Attorneys at Law  
4 1999 Harrison Street, 25th Floor  
Oakland, California 94612-3520  
5 P.O. Box 12979  
Oakland, California 94604-2979  
6 Telephone: (510) 451-0544  
Facsimile: (510) 832-1486  
7

Attorneys for Plaintiff  
8 DAVID LOFTON

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11

12 DAVID LOFTON,

13 Plaintiff,

14 v.  
15

ZURICH AMERICAN INSURANCE  
16 COMPANY, a New York corporation,

17 Defendant.  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Case No. C12-03835 MMC

SECOND AMENDED COMPLAINT FOR  
DAMAGES

JURY TRIAL DEMANDED

COMES NOW, Plaintiff David Lofton, an individual, ("Plaintiff") and alleges as follows:

**JURISDICTIONAL BASIS**

1. Defendant Zurich American Insurance Company ("Zurich") is and at all times relevant hereto was a corporation organized and existing under the laws of the State of New York with a principal place of business in San Francisco County.

2. The Court's jurisdiction in this case is based on Title VII of the 1964 Civil Rights Act, 42 USC 2000(e), et seq. in the first cause of action and related pendant jurisdiction under the California Fair Employment and Housing Act, California Government Code Section 12960, et seq.

3. Plaintiff at all times relevant hereto was and is a resident of Pittsburg, Contra Costa County, California. Zurich is a New York corporation. Plaintiff alleges his damages in this case are in excess of \$75,000. Therefore, complete diversity exists and the Court has diversity jurisdiction over this case.

**INTRODUCTION**

4. Plaintiff is African American, over 60 years old, and a resident of Pittsburg, Contra Costa County, California.

5. Plaintiff performed his duties in multiple positions for Zurich for over a decade in a consistently superior manner. This is the objective conclusion of Plaintiff's superiors and peers as well as Plaintiff's national contacts. The number of individuals who have stepped forward to validate Plaintiff's performance and reputation since his employment problems began is very impressive. There are an abundance of witnesses available to testify not only to Plaintiff's competence as an adjustor and supervisor but also as to his excellence in both areas. His counsel and advice have been regularly sought after by all of these respected organizations; ironically former peers who have been promoted above Plaintiff, and who are white and younger, are among these persons.

6. Plaintiff's claims against Zurich are many. They start with race and age discrimination. Plaintiff is African-American, over the age of 60, and has not been given pay raises or promotions that have been given to less qualified whites, and less qualified younger

1 employees. Plaintiff has been demoted, not given sufficient staff to accomplish assignments or  
2 take uninterrupted vacations, had performance reviews improperly done using Quality Assurance  
3 audits, and had Human Resources Department personnel issues transferred to him for blame.

4 7. While Zurich's policy required them, Plaintiff did not receive the step increases in  
5 his salary over the years at Zurich; in contrast Whites and younger employees did receive the step  
6 increases. Zurich increased Plaintiff's claim load substantially while not doing so to white or  
7 younger employees. Plaintiff's treatment is an overwhelmingly glaring example of racial and age  
8 discrimination.

9 8. Plaintiff complained about this discriminatory treatment. Plaintiff was retaliated  
10 against for his complaints by increased and continuing discrimination in pay, promotions, and  
11 claims assignments.

## 12 **FIRST CAUSE OF ACTION**

### 13 **(Race Discrimination and Retaliation)**

14 For a first cause of action against Zurich and Does 1 through 100, inclusive, and each of  
15 them, Plaintiff alleges as follows:

16 9. Plaintiff realleges and incorporates by reference each and all of the allegations  
17 contained in paragraphs 1 through 8 hereinabove set forth.

18 10. Plaintiff, an African American, started at Zurich over 10 years ago and began  
19 receiving regular raises and promotions. Plaintiff was simply an outstanding performer.

20 11. Plaintiff's excellence in his job is thoroughly documented. Against this  
21 background, Zurich discriminated and retaliated against Plaintiff because of his race, African  
22 American.

23 12. As a direct and proximate result of the extreme and outrageous conduct of Zurich,  
24 Plaintiff has suffered humiliation, mental anguish, and emotional and physical distress, and has  
25 been injured in his health, strength, and activity, including, but not limited to, loss of sleep and  
26 shock and injury to his nervous system, all of which have caused and continue to cause Plaintiff  
27 great mental, physical, and nervous pain and suffering to his damage, the precise amount of  
28 which Plaintiff will prove.

13. As a direct and proximate result of the aforementioned wrongful conduct of Zurich, as hereinabove described, its conduct was willful, wanton, oppressive, fraudulent and malicious, thereby entitling Plaintiff to an award of exemplary and punitive damages against Zurich, the precise amount of which Plaintiff will prove.

14. Plaintiff filed a charge of discrimination against Zurich with the Equal Employment Opportunity Commission (EEOC") and alleges violations herein of Title VII of the 1964 Civil Rights Act, 42 USC § 2000(e), et seq. On April 24, 2012 the EEOC issued Plaintiff a Right to Sue Letter, attached as Exhibit A. Plaintiff has exhausted his administrative remedies with the EEOC and has filed suit in a timely manner. Plaintiff filed a charge of discrimination with the Californian Department of Fair Employment and Housing (DFEH") under Section 12960, et seq. of the California Government Code. On July 17, 2012, the DFEH issued Plaintiff a notice of right to sue, attached as Exhibit B. Plaintiff has exhausted his administrative remedies with the DFEH and has instituted this civil action in a timely manner.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

## SECOND CAUSE OF ACTION

### (Breach of Contract)

For a second cause of action against Zurich, Plaintiff alleges as follows:

15. Plaintiff realleges and incorporates herein by reference each and all of the allegations contained in paragraphs 1 through 14 hereinabove set forth.

16. In or about 2002, Plaintiff and Zurich entered into an oral employment agreement in San Francisco County, California, under which Plaintiff agreed to work for Zurich in the initial capacity of Senior Claims Specialist and for which Zurich agreed to pay Plaintiff compensation.

17. Plaintiff has performed each and every condition and covenant required on his part to be performed pursuant to said employment, and in particular, was continuously employed by Zurich from said date through the present. Plaintiff has at all times relevant herein received positive performance and outstanding contribution evaluations, and has been regularly praised by Zurich's directors, executives, and trade industry groups.





1 and communications which resulted in said implied promises, Zurich covenanted, warranted, and  
2 promised to act in good faith toward and deal fairly with Plaintiff and concerning all other matters  
3 relating to said employment so as not to deprive Plaintiff of or injure his rights to receive the  
4 benefits of said relationship.

5 24. The failure of Zurich to act in good faith and deal fairly with Plaintiff was  
6 wrongful, in bad faith and unfair, and therefore a violation of the legal duty of Zurich to deal  
7 fairly and in good faith with Plaintiff.

8 25. As a direct and foreseeable result of said breach the implied covenant of good faith  
9 and fair dealing, Plaintiff has suffered damages in the form of lost wages, salary, benefits, certain  
10 other incidental and consequential expenses and losses all in a substantial amount, the precise  
11 amount of which Plaintiff will prove.

12 WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

13 **FOURTH CAUSE OF ACTION**

14 **(Age Discrimination)**

15 For a fourth cause of action against Zurich, Plaintiff alleges as follows:

16 26. Plaintiff realleges and incorporates herein by this reference each and all of the  
17 allegations contained in paragraphs 1 through 25 hereinabove set forth.

18 27. Plaintiff is a man over the age of 60 and a resident of Pittsburg, Contra Costa  
19 County, California. Zurich has throughout Plaintiff's employment given pay raises and  
20 promotions to lesser qualified individuals who are younger than Plaintiff.

21 28. As a direct and proximate result of the aforementioned discriminatory acts and  
22 practices of Zurich, Plaintiff has suffered general damages in a substantial sum, the precise  
23 amount of which Plaintiff will prove.

24 29. The discriminatory conduct of Zurich, as hereinabove described was willful,  
25 wanton, oppressive, fraudulent, and malicious, deliberate, egregious, and inexcusable, thereby  
26 entitling Plaintiff to an award of exemplary and punitive damages against said Zurich, the precise  
27 amount of which Plaintiff will prove.

30. Plaintiff filed a complaint of age discrimination with the DFEH under Section 12960, et seq. of the California Government Code. On July 17, 2012, the DFEH issued Plaintiff a notice of right to sue, attached as Exhibit B. Plaintiff has exhausted his administrative remedies and has instituted this civil action in a timely manner.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

### **FIFTH CAUSE OF ACTION**

#### **(Intentional Infliction Of Emotional Distress)**

For a fifth cause of action against Zurich, Plaintiff alleges as follows:

31. Plaintiff realleges and incorporates herein by this reference each and all of the allegations contained in paragraphs 1 through 30 hereinabove set forth.

32. As a direct and proximate result of the extreme and outrageous conduct of Zurich, Plaintiff has suffered humiliation, mental anguish, and emotional and physical distress, and has been injured in his health, strength, and activity, including, but not limited to, loss of sleep and shock and injury to his nervous system, all of which have caused and continue to cause Plaintiff great mental, physical, and nervous pain and suffering to his damage, the precise amount of which Plaintiff will prove.

33. The conduct of Zurich as hereinabove described was willful, wanton, oppressive, fraudulent and malicious, thereby entitling Plaintiff to an award of exemplary and punitive damages against Zurich, the precise amount of which Plaintiff will prove.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

### **SIXTH CAUSE OF ACTION**

#### **(Negligent Infliction Of Emotional Distress)**

For a sixth cause of action against Zurich, Plaintiff alleges as follows:

34. Plaintiff realleges and incorporates herein by this reference each and all of the allegations contained in paragraphs 1 through 33 hereinabove set forth.

35. The conduct of Zurich, as hereinabove described was negligent, careless and wrongful. Zurich and its agents and employees confirmed and ratified the negligent, careless, and wrongful acts of the remaining defendants herein with a careless disregard for Plaintiff's

1 emotional and physical distress. Said confirmation and ratification on the part of Zurich was  
2 done with a negligent, careless, and wrongful disregard of the consequences to Plaintiff.

3 36. As a direct and proximate result of the negligent, careless, and wrongful conduct  
4 of Zurich, Plaintiff has suffered humiliation, mental anguish, and emotional and physical distress,  
5 and has been injured in his health, strength and activity, including but not limited to, a loss of  
6 sleep and the shock and injury to his nervous system, all of which have caused and continue to  
7 cause in Plaintiff great mental, physical and nervous pain and suffering, the precise amount of  
8 which Plaintiff will prove.

9 37. PLAINTIFF HEREBY DEMANDS A JURY TRIAL.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff prays judgment against Zurich, as follows:

- 12 1. For general damages in excess of \$75,000 according to proof;
- 13 2. For exemplary and punitive damages according to proof;
- 14 3. For declaratory judgment that Zurich's conduct complained of herein is unlawful  
15 and in violation of Title VII of the 1964 Civil Rights Act, 42 USC § 2000(e), et seq.;
- 16 4. For declaratory judgment that Zurich's conduct complained of herein is unlawful  
17 and in violation of The California Fair Employment and Housing Act;
- 18 5. For attorneys' fees and costs of suit incurred herein; and
- 19 6. For such other and further relief as this court may deem just and proper.

20 Dated: October 16, 2012

DONAHUE GALLAGHER WOODS LLP

21  
22 By: /s/ George J. Barron

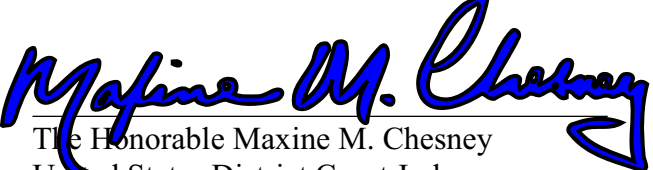
23 George J. Barron  
24 Attorneys for Plaintiff  
25 DAVID LOFTON  
26  
27  
28

~~PROPOSED~~ ORDER

Pursuant to stipulation, the Court hereby ORDERS that Plaintiff file his Second Amended Complaint For Damages on or before October <sup>24</sup>~~22~~, 2012.

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: October 22, 2012

  
The Honorable Maxine M. Chesney  
United States District Court Judge